



4334-63-P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

2 CFR Part 1400

[Docket No. DOI-2015-0007; 167D0102DM / DS62400000 / DLSN00000.000000 /

DX62401]

RIN 1090-AB12

Revision to Nonprocurement Suspension and Debarment Regulations

AGENCY: Office of the Secretary, Interior.

ACTION: Final rule.

SUMMARY: This rule revises the U.S. Department of the Interior (DOI) nonprocurement suspension and debarment regulations in order to enhance transparency of the existing process and to clarify the Department's procedures for resolving nonprocurement suspension and debarment actions.

DATES: This final rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: David M. Sims, Debarment Program Director, Office of Acquisition and Property Management, Office of the Secretary, telephone (202) 513-0689; fax (202) 513-7645; or e-mail david_sims@ios.doi.gov.

SUPPLEMENTARY INFORMATION:

I. Background

A. Regulatory Framework

On August 31, 2005, the Office of Management and Budget (OMB) issued Guidance for Government-wide suspension and debarment (nonprocurement), codified in part 180 of title 2 of the Code of Federal Regulations (70 FR 51862, August 31, 2005). The OMB Guidance required each agency to issue a brief rule that: (1) adopted the guidance, giving it regulatory effect for that agency's activities; and (2) stated any agency-specific additions, clarifications, and exceptions to the Government-wide policies and procedures contained in the guidance. On June 18, 2007, DOI issued its regulation implementing the OMB Guidelines at 2 CFR Part 1400 (72 FR 33383). Today's rule updates the DOI nonprocurement suspension and debarment regulation at Part 1400.

B. Purpose

The original DOI implementing rule does not specify which DOI organizational component or official will conduct fact-finding proceedings for nonprocurement actions. This amended rule explains that the DOI Debarment Program Director is the official who ordinarily conducts fact-finding proceedings, while permitting the Suspending and Debarring Official to refer the case to another component or office for a fact-finding proceeding. This rule does not change the circumstances under which fact-finding proceedings are available to respondents, nor the criteria and standards that apply in fact-finding proceedings. In addition, this rule clarifies that the nonprocurement suspension and debarment case procedures used by DOI are identical to those DOI uses for the procurement suspension and debarment actions pursuant to the Federal Acquisition Regulation at 48 CFR subpart 9.4. Specifically, this rule sets forth the nonprocurement suspension and debarment action practices and procedures used to find facts in actions where the Suspending and Debarring Official determines that there is a genuine dispute

over facts material to the proposed debarment. This rule addresses how persons suspended or proposed for debarment may seek to resolve an action. This rule promotes transparency of DOI internal procedures for resolving suspension and debarment actions.

C. Exemption from Notice and Comment Requirements

The Administrative Procedure Act (APA) requires agencies to publish a notice of proposed rulemaking in the **Federal Register** and provide a period for public comment before issuing a final rule. 5 U.S.C. 553(b). The APA, however, exempts from the requirement of notice and comment “[r]ules of agency organization, procedure, or practice.” 5 U.S.C. 553(b)(A).

This amended rule clarifies suspension and debarment findings; it does not alter the rights or interests of respondents in such proceedings. This rule also identifies existing suspension and debarment program roles and processes. Finally, this rule adds language that recognizes prior changes to, or adoption of, online Federal databases used to support award eligibility decisions. Accordingly, this rule is a rule of agency procedure, exempt from the notice and comment requirements of the APA.

D. Waiver of 30-day Delay in Effective Date

The APA also generally requires a 30-day delay in the effective date of final rules after the date of their publication in the **Federal Register**. 5 U.S.C. 553(d). The 30-day delay may be waived if the agency determines there is good cause to do so because the 30-day delay is impracticable, unnecessary, or contrary to the public interest. 5 U.S.C. 553(d)(3).

There is good cause to waive the 30-day delay in the effective date of this rule, because the delay is unnecessary and contrary to the public interest. As noted above, this

rule is procedural and informational, and does not affect the rights or interests of respondents in nonprocurement suspension and debarment actions for which fact-finding proceedings are available. Moreover, this rule clarifies that the procedures to resolve nonprocurement suspension and debarment actions are the same as the procedures DOI uses to resolve procurement suspension and debarment actions. In so doing, this rule will eliminate potential confusion. Thus, delaying its effective date for 30 days is unnecessary and contrary to the public interest.

II. Required Determinations

A. Regulatory Planning and Review (E.O. 12866 and 13563)

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs in the Office of Management and Budget (OMB) will review all significant rules. The Office of Information and Regulatory Affairs has determined that this rule is not significant.

E.O. 13563 reaffirms the principles of E.O. 12866, calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. E.O. 13563 directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public, where these approaches are relevant, feasible, and consistent with regulatory objectives.

B. Regulatory Flexibility Act

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act [SBREFA] of 1996) (5 U.S.C. 601 et seq.), whenever a Federal agency is required to publish a notice of rulemaking for any proposed

or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Thus, for a regulatory flexibility analysis to be required, impacts must exceed a threshold for “significant impact” and a threshold for a “substantial number of small entities.” See 5 U.S.C. 605(b). SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities.

This rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601, et seq.). This clarification explains that the DOI applies the same procedures and fact-finding process for its nonprocurement and procurement suspension and debarment actions. This rule is merely a clarification of existing process. It makes no substantive change to the 2007 DOI rule, nor does it impose any new requirements on entities subject to a notice of suspension or proposed debarment.

C. Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 804(2)). This rule:

1. Does not have an annual effect on the economy of \$100 million or more. This rule identifies program roles and clarifies that the DOI fact-finding process for nonprocurement suspension and debarment actions is the same as DOI’s fact-finding

process for procurement suspension and debarment actions. This rule is a technical clarification that does not alter existing procedures for resolving nonprocurement suspension and debarment actions.

2. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. As explained above, this rule is a technical rule issued to clarify that DOI's procedures for resolving nonprocurement suspension and debarment actions are identical to DOI's current procedures. This rule impacts only those persons suspended or proposed for debarment.

3. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This rule clarifies DOI's internal practices and procedures which furthers transparency.

D. Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than \$100 million per year. This rule does not have a significant or unique effect on State, local, or tribal governments, or the private sector. This rule does not impose requirements on State, local, or tribal governments. This rule clarifies that the DOI fact-finding process for nonprocurement suspension and debarment actions is the same as DOI's fact-finding process for procurement suspension and debarment actions. This rule impacts only those persons suspended or proposed for debarment. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531, et seq.) is not required.

E. Takings (E.O. 12630)

Under the criteria in section 2 of E.O. 12630, this rule does not have significant takings implications. This rule is a technical rule revision that clarifies that the DOI fact-finding process for nonprocurement suspension and debarment actions is the same as DOI's fact-finding process for procurement suspension and debarment actions. This rule impacts only those persons suspended or proposed for debarment. This rule promotes process transparency of DOI internal suspension and debarment action resolution procedures. A takings implication assessment is not required.

F. Federalism (E.O. 13132)

Under the criteria in section 1 of E.O. 13132, this rule does not have sufficient Federalism implications to warrant the preparation of a Federalism summary impact statement. This rule is a technical rule revision that clarifies that the DOI fact-finding process for nonprocurement suspension and debarment actions is the same as DOI's fact-finding process for procurement suspension and debarment actions. This rule impacts only those persons suspended or proposed for debarment. A Federalism summary impact statement is not required.

G. Civil Justice Reform (E.O. 12988)

This rule complies with the requirements of E.O. 12988. Specifically, this rule:

1. Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and
2. Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

H. Consultation with Indian tribes (E.O. 13175)

Under the criteria in E.O. 13175, we have evaluated this rule and determined that it has no substantial direct effect on federally recognized Indian tribes. This rule is a technical rule revision that clarifies that the DOI fact-finding process for nonprocurement suspension and debarment actions is the same as DOI's fact-finding process for procurement suspension and debarment actions. This rule impacts only those persons suspended or proposed for debarment.

I. Paperwork Reduction Act

This rule does not contain information collection requirements, and a submission under the Paperwork Reduction Act (44 U.S.C. 3501, et seq.) is not required.

J. National Environmental Policy Act

This rule does not constitute a major Federal action significantly affecting the quality of the human environment under the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 et seq.). This rule is categorically excluded from the requirement to prepare a detailed statement, because it qualifies as a regulation of an administrative nature within the meaning of 43 CFR 46.210(i).

K. Effects on the Energy Supply (E.O. 13211)

This rule is not a significant energy action under the definition in E.O. 13211. A Statement of Energy Effects is not required.

L. Clarity of This Regulation

We are required by section 1(b)(12) of E.O. 12866 and section 3(b)(1)(B) of E.O. 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

1. Be logically organized;

2. Use the active voice to address readers directly;
3. Use common, everyday words and clear language rather than jargon;
4. Be divided into short sections and sentences; and
5. Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the "FOR FURTHER INFORMATION CONTACT" section. To better help us revise this rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that you find unclear, which sections or sentences are too long, and the sections where you feel lists or tables would be useful.

List of Subjects in 2 CFR Part 1400

Administrative practice and procedure, Debarment, Grant programs, Government contracts, Reporting and recordkeeping requirements, Suspension.

For the reasons set out in the preamble, we are amending part 1400, chapter XIV of subtitle B, title 2 of the Code of Federal Regulations as set forth below:

PART 1400—NONPROCUREMENT SUSPENSION AND DEBARMENT

1. The authority citation for part 1400 is revised to read as follows:

AUTHORITY: Section 2455, Pub. L. No. 103-355, 108 Stat. 3327 (31 U.S.C.6101 note); 5 U.S.C. 301; E.O. 12549 (3 CFR, 1986 Comp., p. 189); and E.O. 12689 (3 CFR, 1989 Comp., p. 235).

2. Revise § 1400.10 to read as follows:

§ 1400.10 What does this part do?

This part provides procedures for the Department of the Interior nonprocurement suspension and debarment actions.

3. Add subparts E, F, G, and H to read as follows:

Subpart E—System for Award Management Exclusions

Sec.

1400.526 Who at DOI Places Exclusions Information into SAM?

Subpart F—General Principles Relating to Suspension and Debarment Actions

1400.600 How does a DOI debarment or suspension action begin?

1400.635 May DOI settle a debarment or suspension action?

Subpart G—Suspension

1400.751 What does the Suspending and Debarring Official consider in making a decision on whether to continue a suspension following notice issuance?

1400.752 When does a contested suspension action include a fact-finding proceeding?

1400.753 How is the fact-finding proceeding conducted?

1400.756 May a respondent request administrative review of the Suspending and Debarring Official's decision?

Subpart H—Debarment

1400.861 What procedures does the Suspending and Debarring Official follow to make a decision on whether to impose debarment following notice issuance?

1400.862 When does a contested debarment action include a fact-finding proceeding?

1400.863 How is the fact-finding proceeding conducted?

1400.876 May a respondent request administrative reconsideration of a decision?

1400.881 May a respondent seek award eligibility reinstatement at any time before the end of the period of debarment?

Subpart E—System for Award Management Exclusions

§ 1400.526 Who at DOI Places Exclusions Information into SAM?

The Office of Acquisition and Property Management (PAM) Debarment Program personnel enter information about persons suspended or debarred by DOI into the GSA

Web-based System for Award Management (SAM) within 3 working days of the effective date of the action.

Subpart F—General Principles Relating to Suspension and Debarment Actions

§ 1400.600 How does a DOI suspension or debarment action begin?

(a) Federal officials, DOI award officials, employees, or other sources will forward information indicating the potential existence of a cause for suspension or debarment, as listed in 2 CFR 180.700 and 180.800, to:

(1) The DOI Office of Inspector General Administrative Remedies Division (OIG ARD); or

(2) The Suspending and Debarring Official.

(b) If forwarded to the OIG ARD, that office will conduct a review to determine if a recommendation for administrative action is warranted. If warranted, the OIG ARD will prepare and submit to the Suspending and Debarring Official an Action Referral Memorandum (ARM) with supporting documentation for the administrative record.

(c) OIG ARD will also identify potential matters for case development and conduct a review to determine if a recommendation for administrative action is warranted. If warranted, the OIG ARD will prepare and submit to the Suspending and Debarring Official an ARM with supporting documentation for the administrative record.

(d) The Suspending and Debarring Official will review the ARM to determine the adequacy of evidence to support and initiate:

(1) A suspension by taking the actions listed in 2 CFR 180.615 and 180.715; or

(2) A debarment by taking the actions listed in 2 CFR 180.615 and 2 CFR 180.805; and

(3) Notification of the respondent on how the respondent may contest the action.

§ 1400.635 May DOI settle a debarment or suspension action?

Under 2 CFR 180.635, the Suspending and Debarring Official may resolve a suspension or debarment action through an administrative agreement if it is in the best interest of the Government at any stage of proceedings, where the respondent agrees to appropriate terms. The specific effect of administrative agreements that incorporate terms regarding award eligibility will vary with the terms of the agreements. Where the Suspending and Debarring Official enters into an administrative agreement, PAM will notify the award officials by:

(a) Entering any appropriate information regarding an exclusion or the termination of an exclusion into the SAM; and

(b) Entering the agreement into the Federal Awardee Performance Integrity Information System (FAPIIS) or its successor system.

Subpart G—Suspension

§ 1400.751 What does the Suspending and Debarring Official consider in making a decision on whether to continue a suspension following notice issuance?

(a) In the event a respondent does not contest the suspension in writing within the time period provided at 2 CFR 180.715 through 180.725, the suspension will remain in place without further proceedings.

(b) Where a suspension is contested, the Suspending and Debarring Official follows the provisions at 2 CFR 180.730 through 180.755 in reaching a decision on whether to continue or terminate the suspension.

(c) The contested suspension proceeding will include an oral Presentation of Matters in Opposition (PMIO), where one is requested by a respondent. The PMIO is conducted in an informal business meeting format and electronically recorded for inclusion in the administrative record.

(d) Where fact-finding occurs as part of the suspension proceeding, after receiving the findings of fact and the hearing record from the fact-finding official, the Suspending and Debarring Official completes suspension proceedings, including a PMIO if one has been requested and did not occur before the fact-finding proceeding. Following completion of suspension proceedings, the Suspending and Debarring Official issues a written decision under the provisions of 2 CFR 180.750 and 180.755.

§ 1400.752 When does a contested suspension action include a fact-finding proceeding?

(a) Fact-finding to resolve genuine disputes over facts material to the suspension occurs where the conditions listed in 2 CFR 180.735(b) are satisfied.

(b) The fact-finding official for DOI suspension proceedings is the DOI Debarment Program Director, unless the Suspending and Debarring Official designates another DOI official to serve as the fact-finding official.

§ 1400.753 How is the fact-finding proceeding conducted?

(a) The fact-finding proceeding is conducted in accordance with PAM's suspension and debarment program fact-finding procedures, a copy of which is provided to the respondent.

(b) The fact-finding proceeding is undertaken in accordance with 2 CFR 180.745.

(1) The reporters' fees and other direct costs associated with the fact-finding proceeding are borne by the bureau(s) or office(s) initiating the suspension action, except in the case of actions initiated by the OIG ARD.

(2) For actions initiated by the OIG ARD, the costs are borne by bureau(s) and/or office(s) out of which the matter arose.

(3) A transcribed record transcript of the fact-finding proceedings is available to the respondent as provided at 2 CFR 180.745(b).

(c) The fact-finding official provides findings of fact and the hearing record to the Suspending and Debarring Official. The fact-finding official files the original copy of the transcribed record of the fact-finding proceedings transcript with the administrative record.

§ 1400.756 May a respondent request administrative review of the Suspending and Debarring Official's decision?

A respondent may seek administrative reconsideration of the Suspending and Debarring Official's decision by following the procedures in this section.

(a) Within 30 days of receiving the decision, the respondent may ask the Suspending and Debarring Official to reconsider the decision for clear and material errors of fact or law that would change the outcome of the matter. The respondent bears the burden of demonstrating the existence of the asserted clear and material errors of fact or law.

(b) A respondent's request for reconsideration must be submitted in writing to the Suspending and Debarring Official and include:

(1) The specific findings of fact and conclusions of law believed to be in error;
and

(2) The reasons or legal basis for the respondent's position.

(c) The Suspending and Debarring Official may, in the exercise of discretion, stay the suspension pending reconsideration. The Suspending and Debarring Official will:

(1) Notify the respondent in writing of the decision on whether to reconsider the decision; and

(2) If reconsideration occurs, notify the respondent in writing of the results of the reconsideration.

Subpart H—Debarment

§ 1400.861 What procedures does the Suspending and Debarring Official follow to make a decision on whether to impose debarment following notice issuance?

(a) In the event a respondent does not contest the proposed debarment in writing within the time period provided at 2 CFR 180.815 through 180.825, the debarment as proposed in the notice will be imposed without further proceedings.

(b) Where a proposed debarment is contested, the Suspending and Debarring Official will follow the provisions at 2 CFR 180.830 through 180.870 in reaching a decision on whether to impose a period of debarment.

(c) The administrative record will include an oral PMIO, in those actions where the respondent requests one. The PMIO is conducted in an informal business meeting format and electronically recorded for the record.

(d) Where fact-finding occurs as part of the proposed debarment proceeding, after receiving the findings of fact and the hearing record from the fact-finding official, the

Suspending and Debarring Official completes debarment proceedings, including a PMIO if one has been requested and did not occur before the fact-finding proceeding.

Following completion of proposed debarment proceedings, the Suspending and Debarring Official issues a written decision under the provisions of 2 CFR 180.870.

§ 1400.862 When does a contested proposed debarment action include a fact-finding proceeding?

Fact-finding to resolve genuine disputes over facts material to the proposed debarment occurs where the conditions at 2 CFR 180.830(b) are satisfied.

§ 1400.863 How is the fact-finding proceeding conducted?

(a) The fact-finding proceeding is conducted in accordance with PAM's suspension and debarment program fact-finding procedures, a copy of which is provided to the respondent.

(b) The fact-finding official for DOI debarment proceedings is the DOI Debarment Program Director, unless the Suspending and Debarring Official designates another DOI official to serve as the fact-finding official.

(c) The fact-finding proceeding is undertaken in accordance with 2 CFR 180.840.

(1) The reporters' fees and other direct costs associated with the fact-finding proceeding are borne by the bureau(s) or office(s) initiating the debarment action, except in the case of actions initiated by the OIG.

(2) For actions initiated by the OIG, the costs are borne by the bureau(s) and/or office(s) out of which the matter arose.

(3) A transcribed record of the fact-finding proceedings is available to the respondent as provided at 2 CFR 180.840(b).

(d) The fact-finding official provides written findings of fact and the hearing record to the Suspending and Debarring Official. The fact-finding official files the original copy of the transcribed record of the fact-finding proceedings with the administrative record.

§ 1400.876 May a respondent request administrative reconsideration of a decision?

A respondent may request the Suspending and Debarring Official to review a decision under this part as follows:

(a) Within 30 days of receiving the decision, the respondent may ask the Suspending and Debarring Official to reconsider the decision based on clear and material error(s) of fact or conclusion(s) of law that would change the outcome of the matter. The respondent bears the burden of demonstrating the existence of the asserted clear and material error(s) of fact or conclusion(s) of law.

(b) The respondent's request for reconsideration must be submitted in writing to the Suspending and Debarring Official and include:

(1) The specific finding(s) of fact and conclusion(s) of law the respondent believes are in error; and

(2) The reasons or legal bases for the respondent's position.

(c) The Suspending and Debarring Official may in the exercise of discretion stay the debarment pending reconsideration. The Suspending and Debarring Official will review the request for reconsideration and:

(1) Notify the respondent in writing whether the Suspending and Debarring Official will reconsider the decision; and

(2) If reconsideration occurs, notify the respondent in writing of the results of the reconsideration.

§ 1400.881 May a respondent seek award eligibility reinstatement at any time before the end of the period of debarment?

In addition to a petition for reconsideration based on a clear error of material fact or law, a respondent may, at any time following imposition of debarment, request the Suspending and Debarring Official to reduce or terminate the period of debarment based upon the factors under the provisions of 2 CFR 180.880.

Subpart I—Definitions

4. Add §§ 1400.1011 through 1400.1014 to subpart I to read as follows:

§ 1400.1011 The DOI Debarment Program Director.

The Debarment Program Director is the individual in PAM who advises the Suspending and Debarring Official on DOI suspension and debarment practices and procedures, manages the suspension and debarment process, and acts as the DOI suspension and debarment program fact-finding official.

§ 1400.1012 The OIG Administrative Remedies Division (ARD).

The OIG ARD prepares and forwards suspension and/or debarment action referral memoranda to the Suspending and Debarring Official and may provide additional assistance, in the course of action proceedings.

§ 1400.1013 The administrative record.

The administrative record for DOI suspension and debarment actions consists of the initiating action referral memorandum and its attached documents; the action notice; contested action scheduling correspondence; written information, arguments and

supporting documents submitted by a respondent in opposition to the action notice; written information, arguments and supporting documents submitted by the OIG ARD in response to information provided by a respondent; the electronic recording of the PMIO, where a PMIO is held as part of the proceeding; where fact-finding is conducted, the transcribed record of the fact-finding proceedings, and findings of fact; and the final written determination by the Suspending and Debarring Official on the action; or, alternatively, the administrative agreement endorsed by the respondent and the Suspending and Debarring Official that resolves an action.

§ 1400.1014 Respondent.

Respondent means a person who is the subject of a DOI suspension or proposed debarment action.

Dated: September 16, 2016.

Signed:_____

Kristen J. Sarri

Principal Deputy Assistant Secretary – Policy, Management and Budget

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